No. 88-182

In the Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL ELECTRIC COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND JOHN M. GRAVITT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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In this case, the United States and General Electric Company (GE) agreed to settle an action originally brought by respondent Gravitt under the *qui tam* provision of the False Claims Act (FCA), 31 U.S.C. (& Supp. IV) 3729 *et seq.* The district court rejected the proposed settlement, and declined to dismiss the action. When the United States and GE sought to appeal that decision, the court of appeals dismissed the appeals, concluding that the district court's action was not a final, appealable order under 28 U.S.C. 1291 (Pet. App. 1a-2a). GE now asks this Court to review the court of appeals' ruling on the question of appealability.

We decided not to petition on behalf of the United States in this case because we were unable to conclude that further review of the court of appeals' unpublished deci-

sion is warranted at this time. We nevertheless agree with petitioner that the decision of the court of appeals is incorrect, and that this case presents a potentially important procedural question that this Court has expressly reserved. Accordingly, we do not oppose GE's petition.

1. Petitioner's statement of the case (Pet. 3-8) contains the information material to the consideration of the issue presented. We therefore provide only a brief summary of the relevant facts. Promptly after this *qui tam* action was filed by respondent Gravitt, the United States entered an appearance and exercised its right under the statutory provisions then in effect (31 U.S.C. 3730(b)(2)) to assume responsibility for the litigation. After an extensive investigation, the government negotiated and entered into a settlement with the defendant, GE, under which GE agreed to pay $234,000 in lieu of the civil penalties that the United States might have sought under the FCA, and also agreed to forego any claims against the United States based on the apparently substantial net undercharges to the government that had resulted from the scheme of GE's employees (Pet. App. 45a-46a). In submitting a proposed stipulation of dismissal to the district court, the United States asserted that the district court had no authority to assess the adequacy of the settlement under the terms of the statute as it then stood. See 31 U.S.C. 3730(b)(1).[1]

Following the district court's assertion of authority to review the adequacy of the settlement (Pet. App. 32a-34a) and the court of appeals' refusal to accept an interlocutory appeal, certified by the district court under 28 U.S.C.

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[1] We also argued that Gravitt had no right to object to the settlement since he was not a proper relator under the existing statute because the information upon which the action was based was already within the knowledge of the government at the time the action was commenced (31 U.S.C. 3730(b)(4)).

1292(b), on the question of the district court's authority (Pet. App. 30a-31a), the district court referred the case to a special master to assess the fairness of the proposed settlement (*id.* at 35a-36a). After extensive proceedings, including discovery by Gravitt (whose motion to intervene had been granted by the district court (*id.* at 37a)), the special master issued a full report. The report concluded (*id.* at 9a-29a) that "the US diligently investigated the violation alleged by Gravitt, and that the proposed settlement is fair, adequate, and reasonable under all the circumstances" (*id.* at 29a).

While the case was pending before the special master, the 1986 amendments to the FCA were enacted.[2] Those amendments generally increase the penalties for a false claims violation (see, *e.g.*, 31 U.S.C. (Supp. IV) 3729(a) (mandatory forfeiture increased from $2,000 per false claim to not less than $5,000 and not more than $10,000 per false claim)), and make it easier for the government to prove a violation (see, *e.g.*, 31 U.S.C. (Supp. IV) 3729(b) ("no proof of specific intent to defraud is required")). In urging the district court to uphold the special master's report, the United States argued that the district court should evaluate the reasonableness of the settlement in light of the law in effect at the time it was agreed to, rather than under the provisions of the 1986 amendments.[3] In particular, the United States argued that a new provision authorizing a district court to determine whether a settlement to which a relator objects is "fair, adequate, and

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[2] False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153.

[3] The United States did not contend that the 1986 FCA amendments are inapplicable in their entirety to cases pending at the date of enactment. Indeed, we have argued that some parts of the amendments should be given retroactive effect.

reasonable under all the circumstances" (31 U.S.C. (Supp. IV) 3730(c)(2)(B)), should not be construed to authorize judicial review of the adequacy of a settlement entered into before the enactment of the amendments. The United States also argued that, in light of the potential difficulties of the case and the substantial benefits to be derived from the settlement, the settlement should be considered fair and adequate under any possible standard. Thus, on appeal, the United States would have argued both that the district court was without authority to pass on the adequacy of the settlement, and that—even if the court had such authority—it abused its discretion by declining to approve the settlement before it.

In a brief unpublished order, the court of appeals dismissed the appeals filed by petitioner and the United States. Relying on *Carson* v. *American Brands, Inc.*, 450 U.S. 79 (1981), the court of appeals stated that the district court's order refusing to accept the settlement was neither a final collateral order appealable under 28 U.S.C. 1291, nor an interlocutory order refusing an injunction appealable under 28 U.S.C. 1292.

2. Although this Court has repeatedly stressed that the collateral order doctrine must be applied only to a "small class" of orders (*Van Cauwenberghe* v. *Biard*, No. 87-336 (June 13, 1988), slip op. 4; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)), there are substantial arguments why a district court order rejecting a settlement agreement should be regarded as an appealable "collateral order" under 28 U.S.C. 1291. Moreover, as petitioner explains (Pet. 8-10), the question whether such an order may be appealed as a collateral order is a matter of considerable uncertainty that has not been resolved by this Court.

The Court recently reiterated in *Van Cauwenberghe* that the established test for identifying an appealable collateral

order comprises three elements: the order "must (1) 'conclusively determine the disputed question', (2) 'resolve an important issue completely separate from the merits of the action', and (3) 'be effectively unreviewable on appeal from a final judgment' " (slip op. 4-5 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). There can be little doubt that the district court's order rejecting the instant settlement " 'conclusively determine[d]' " two distinct questions: whether the court had authority under the statute to rule upon the propriety of the settlement, and whether (assuming it had such authority) the particular settlement reached was fair and reasonable. Furthermore, these questions are both arguably important ones that are " 'completely separate from the merits.' " While the Court has continued to apply the latter phrase with great stringency (see *Van Cauwenberghe*, slip op. 10-12), it has also recognized that courts assessing the fairness of a settlement "do not decide the merits of the case or resolve unsettled legal questions" (*Carson* v. *American Brands, Inc.*, 450 U.S. at 88 n.14). Certainly, the issue of the propriety of a settlement is "conceptually distinct" from the merits of an FCA case. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 527 (1985). Finally, and perhaps most importantly, a trial court order refusing to accept a settlement will generally be—as it plainly is here—"effectively unreviewable on appeal from a final judgment." The settlement in the present case, by its own terms, lapses in the event that it is finally disapproved and the case goes to trial (Pet. App. 45a). Such provisions are by no means unusual, since one of the major inducements to settlement is the avoidance of litigation costs, and forcing a case to trial largely defeats the purpose of settlement. Thus, the right of parties to settle litigation on terms they consider mutually advantageous will frequently be lost irrevocably unless such orders may be appealed.

The issue whether orders refusing to approve settlements are appealable under 28 U.S.C. 1291 has received conflicting answers in the past. Indeed, in *Carson* v. *American Brands, Inc.*, this Court expressly noted the existence of a split of circuit authority on that question (450 U.S. at 82-83 n.6). In *Carson*, however, the Court found it unnecessary to resolve that conflict, since it held that the order in question was appealable under 28 U.S.C. 1292(a), as the effective denial of an injunction (450 U.S. at 83 & n.7).[4] After *Carson*, the conflict has dissipated somewhat, since the circuit that had previously announced the clearest holding to the effect that such orders were appealable under Section 1291 subsequently reversed itself, stating that *Carson* had resolved the issue in favor of allowing such appeals only under Section 1292(a). *EEOC* v. *Pan American World Airways, Inc.*, 796 F.2d 314, 318 n.7 (9th Cir. 1986), cert. denied, 479 U.S. 1030 (1987). While we disagree with that reading of *Carson*, it certainly diminishes the vitality of any split of circuit authority, since the only remaining circuit that has allowed such appeals has done so without discussion of the jurisdictional issue. See *In re International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973).[5]

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[4] In the court below, petitioner and the United States also invoked Section 1292(a) as supporting appellate review, arguing that the order sought from the district court was partly injunctive in character because it would have barred petitioner from making certain future claims. Petitioner has not sought review of that question in this Court.

[5] As the Court noted in *Carson* (450 U.S. at 82-83 n.6), the appealability of such orders under 28 U.S.C. 1291 had been denied by the Fourth Circuit in the case then under review (606 F.2d 420 (1979)), and by the Second Circuit in *Seigal* v. *Merrick*, 590 F.2d 35 (1978). See also *Donovan* v. *Robbins*, 752 F.2d 1170, 1172 (7th Cir. 1985) (dictum agreeing with those holdings).

3. Whether or not orders disapproving settlements should be appealable under the collateral order doctrine as a general matter, two additional considerations make the case for allowing such appeals in the present circumstances especially compelling. First, as noted above, we have argued not only that the settlement should be approved, but that the district court was without authority to disapprove it. The question of the district court's authority to review the adequacy of the settlement is entirely separate from the merits, since it does not require any consideration of the particular facts of an individual case.

The Second Circuit recognized this distinction in *Donovan* v. *Occupational Safety & Health Review Commission*, 713 F.2d 918 (1983). There, the Secretary of Labor had petitioned for review of an order of the Occupational Safety and Health Review Commission (OSHRC) holding that it had the authority to review a settlement entered into by the Secretary. The court indicated that under its earlier ruling in *Seigal* v. *Merrick*, 590 F.2d 35 (1978), an order disapproving the settlement would itself probably not be an appealable collateral order (713 F.2d at 924 n.10). Nevertheless, the court held that the Secretary could invoke the collateral order doctrine to obtain review of the threshold question whether OSHRC had authority to review the settlement in the first place (*id.* at 923-924). See also *Marshall* v. *Oil, Chemical & Atomic Workers Int'l Union*, 647 F.2d 383, 387 (3d Cir. 1981).

Although the presence of the question of the district court's authority to review the adequacy of the settlement makes this a stronger case for application of the collateral order doctrine, the addition of this element does not appear, however, to establish a substantial split in circuit authority. The Sixth Circuit itself has entertained a petition for review in circumstances similar to those presented in *Donovan* v. *OSHRC*, *supra*, and *Marshall* v. *Oil*,

Chemical & Atomic Workers Int'l Union, supra. See *Marshall* v. *OSHRC,* 635 F.2d 544, 548-549 (6th Cir. 1980). And there is nothing in the brief order entered in the present case to suggest that the Sixth Circuit has disavowed its earlier decision in *Marshall* v. *OSHRC, supra.* Moreover, unlike the issue in the OSHA cases, the precise question here—whether the district court lacked authority to review the propriety of the settlement under the pre-amendment FCA—is unlikely to recur, since the 1986 FCA amendments unquestionably apply to all newly filed actions under the Act's *qui tam* provisions.

There is another important reason why this case is unlike routine cases in which settlements are rejected. While other statutes that require judicial approval of settlement agreements generally seek to protect a variety of private interests, such as those of class members or corporate shareholders, the review of settlements under the FCA directly affects—and may impede—the actions of the Executive Branch in its enforcement of the law. As petitioner correctly notes (Pet. 17-19), the conduct of litigation on behalf of the United States is a central part of the President's Article II authority to "take Care that the Laws be faithfully executed," and indeed members of this Court have, on more than one occasion, questioned whether there can be any proper judicial role in accepting or rejecting settlements reached by the government. See *Maryland* v. *United States,* 460 U.S. 1001, 1004 (1983) (Rehnquist, J., dissenting); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129, 156-157 (1967) (Stewart, J., dissenting).

Assuming that the district court was properly called upon to assess the fairness and reasonableness of the settlement under the 1986 FCA amendments, these principles of separation of powers should nonetheless inform decisions concerning the exercise of that delicate responsi-

bility. Specifically, they should weigh heavily in favor of permitting an immediate appeal in cases such as this. Where a district court improperly substitutes its judgment for that of the officials responsible for the conduct of litigation, a serious intrusion into Executive Branch responsibilities will be irrevocable unless some avenue exists for effective review.[6] Although this consideration would not by itself render an interlocutory order appealable, it is certainly a proper factor to weigh in considering whether the rejection of a settlement is a collateral order. Cf. *Mitchell* v. *Forsyth*, 472 U.S. at 526-527 (discussing, in the course of collateral order analysis, the importance of underlying policies of limiting interference with actions by federal officials).

4. While petitioner correctly notes (Pet. 19) that numerous *qui tam* actions are now pending under the FCA as amended, the instant case is, thus far, the only one in which a government settlement has been disapproved. Accordingly, it is unclear at this time how often the issue of appealability will arise, or if it does arise, whether the court of appeals' unpublished opinion in the instant case will have any influence on other courts. In addition, although the general question of the appealability of deci-

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[6] The present case brings these concerns into sharp focus. The district court's order rejecting the special master's report and disapproving the settlement fails to demonstrate any inadequacies in the government's investigation or negotiation of this case; instead, it displays an alarming willingness to second-guess the actions and motives of the Executive Branch officers appearing before it (Pet. App. 6a-7a). For example, the court suggested that an Executive Branch decision not to grant immunity to secure testimony in this civil action could constitute grounds for rejecting the settlement (*id.* at 7a-8a). While this Court is not, in this petition, called upon to assess the correctness of any of the actions of the district court, we submit that the government should have some opportunity to present such issues to an appellate tribunal.

sions rejecting settlement agreements under 28 U.S.C. 1291 is one over which there is a good deal of uncertainty, there is not, at present, a substantial split in authority on that question among the federal courts of appeals. For those reasons, the United States did not file a petition for a writ of certiorari in this case.

We nevertheless agree with petitioner that the court of appeals erred in dismissing the appeals on the ground that the district court's rejection of the settlement was not a collateral order appealable under 28 U.S.C. 1291. Because we believe the court of appeals erred in dismissing the appeals, and because the issue may be of some continuing significance, the United States does not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

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Solicitor General

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